

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KATHY JO HARRIS)	
Claimant)	
VS.)	
)	
THE BOEING COMPANY - WICHITA)	Docket Nos. 176,706
Respondent)	& 176,707
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKER COMPENSATION FUND)	

ORDER

Respondent, insurance carrier and claimant appeal from a December 28, 1994 Award entered by Administrative Law Judge Shannon S. Krysl.

APPEARANCES

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jerome R. Jones, appearing for Andrew E. Busch, of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

Respondent seeks review of the findings and conclusions by the Administrative Law Judge concerning the nature and extent of claimant's disability in both docketed claims. Claimant, likewise, appeals the issue of the nature and extent of disability and, in addition, raises an issue regarding the compensability or proof of a second injury in Docket No. 176,707.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds that the Awards entered by the Administrative Law Judge should be affirmed as to Docket No. 176,707 and modified as to Docket No. 176,706 to find claimant entitled to an award based upon a 52 percent work disability.

The Appeals Board adopts the analysis of the evidence by the Administrative Law Judge regarding the finding of a series comprising one accident as opposed to two separate accidental injuries. For the purposes of calculating benefits, following the stipulation of the parties and the finding of the Administrative Law Judge in Docket No. 176,706, the claimant's date of accident is found to be February 28, 1993 her last date worked. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

The Appeals Board does not arrive at the same percentage losses of labor market access and wage-earning ability as those found by the Administrative Law Judge. The two vocational experts each testified to a percentage representing the extent to which claimant's ability to earn comparable wages has been reduced. In each case their opinion was based upon an hourly rate of pay which the respective expert projected claimant retained the ability to earn post-injury. However, in the case of both experts, their opinions as to the percentage of loss did not correspond to their projected hourly rate opinions when compared to the claimant's stipulated average weekly wage. The percentages testified to were low as to both experts, more so with respect to Mr. Maurice L. Entwistle than with Mr. James Molski. Moreover, the opinion as to the claimant's percentage loss of labor market, which the Administrative Law Judge attributed to Mr. Molski, was in error. The Administrative Law Judge determined Mr. Molski's opinion of a 65 to 70 percent labor market loss to have utilized a combination of all claimant's restrictions including the preexisting restrictions for the prior ankle injury. However, Mr. Molski clearly testified that he was treating the ankle restrictions as preexisting. He gave the following responses to questions from claimant's counsel:

"Q And taking your first report first, let's talk about that. What was your opinion about loss of access to the labor market?"

"A With the total gamut of restrictions from Dr. Gluck and assuming the other restrictions already as being in effect, that there was a 65 to 70 percent loss of available work options for this lady."

"Q Okay. And that's as of the date of the injuries involved in this case, is that right?"

"A Yes, sir."

"Q Okay. Had she suffered some loss of access to the labor market based on the first injury that she reported that's not at issue in this case; that would be the injury to the lower extremity?"

"A Yes, she would in my opinion."

"Q The 65 to 70 percent that you're opining in this case, is that a loss of 65 to 70 percent of the labor market that she had remaining to her after that first injury?"

"A Yes."

"A I assumed when I made my calculations that she was having some previous work restrictions that she needed to follow, and what I gave you are my opinions, assuming those restrictions as being in place, what the loss of access would be with the additional restrictions provided by Dr. Gluck." (James Molski deposition, page 10, lines 14-25; page 11, lines 1-9, and 24-25; page 12, lines 1-4.)

On cross-examination Mr. Molski repeated this same opinion testimony as follows:

"Q Now, you talked a little bit on direct examination about some preexisting limitations relative to a prior foot injury. What are those restrictions? Could you read those into the record for us."

"A I've got a copy of the Boeing medical limitations form. And let's see what they are. Limit walk, stair climbing, no ladder climbing. Sitting work 10 to 20 minutes each hour with left leg elevated."

"Q Okay. And before I go further, she also told you that Boeing was adhering to those restrictions at the time of her most recent injuries, correct?"

"A Yes."

"Q All right. Now, it's my understanding that you took into account these restrictions in rendering your opinions today, is that correct?"

"A Yes, sir."

"Q And from what I understood on direct examination, it's your opinion that this lady has between a 65 and 70 percent loss of

the remaining labor market after you subtract the labor market attributable to the prior foot injury, is that correct?"

"A Correct." (James Molski deposition, page 17, lines 6-25; page 18, lines 1-4.)

Therefore, the Administrative Law Judge should not have subtracted the 50 to 55 percent labor market loss that Mr. Molski indicated could be assigned to the restrictions resulting from the ankle injury. Instead of the 15 to 20 percent the Administrative Law Judge used as Mr. Molski's opinion of claimant's labor market loss, the 65 to 70 percent figure should have been utilized.

With regard to claimant's loss of ability to earn a comparable wage, Mr. Molski's opinion that claimant has a post-injury wage-earning ability of \$5 to \$5.50 per hour results in a loss of 73 to 76 percent when compared to claimant's stipulated average weekly wage of \$815.10.

Likewise, Mr. Entwistle's 47 to 53 percent wage-loss opinion changes to 61 percent when his \$8-per-hour post-injury ability opinion is compared to the stipulated wage. His 5 percent labor market loss figure remains the same, as it was based upon the assumption that the ankle restrictions were in place prior to the injuries which are the subject of this claim.

Thus, the evidence from the vocational experts, as revised, indicates claimant's injuries which are the subject of these docketed claims resulted in an additional 5 percent to 67.5 percent labor market loss. The average of these opinions is 36.25 percent. The average of the wage loss opinions of between 61 percent and 74.5 percent is 67.75 percent. Giving both components equal weight results in a work disability of 52 percent. Accordingly, the Appeals Board agrees with the Administrative Law Judge that claimant has sustained her burden of proving a work disability in excess of her functional impairment. The other findings of fact and conclusions of law in the Award by the Administrative Law Judge are found to be accurate and appropriate and are hereby adopted by the Appeals Board as its own as if specifically set forth herein to the extent they are not inconsistent with the specific findings and conclusions of the Appeals Board enumerated herein.

AWARD

Docket No. 176,706

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated December 28, 1994, in Docket No. 176,706 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kathy Jo Harris, and against the

respondent, The Boeing Company - Wichita, and the insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained on February 28, 1993, the last day worked.

The claimant is entitled to 66 weeks temporary total disability at the rate of \$299.00 per week or \$19,734.00 followed by a maximum of 284.05 weeks at the rate of \$282.58 per week or \$80,266.00 for a 52% permanent partial general body impairment of function, making a total maximum award of \$100,000.00.

As of May 30, 1996, there is due and owing claimant 66 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$19,734.00, followed by 103.57 weeks of permanent partial disability compensation at the rate of \$282.58 per week in the sum of \$29,266.81, for a total of \$49,000.81 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$50,999.19 is to be paid for 180.48 weeks at the rate of \$282.58 per week, until fully paid or further order of the Director.

Docket No. 176,707

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated December 28, 1994, in Docket No. 176,707, should be and hereby is, affirmed in all respects and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Eric K. Kuhn, Wichita, KS
Andrew E. Busch, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director

KATHY JO HARRIS

6

DOCKET NOS. 176,706 & 176,707